No. 95-1373

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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INTRODUCTION

Amtrak concedes in its opposition that its asserted policy against political advertising applies to all Penn Station advertising. Pet. Opp. 9. It now describes this restriction as permitting only "commercial advertising." *Id.* at 2.[1] Yet the district court found that Amtrak had permitted the display of numerous noncommercial ads in Penn Station. Pet. App. 20c.

[1] In fact, no Amtrak official ever described the policy in this way. Pet. 6-7 (delineating Amtrak officials' conflicting descriptions of policy); *see also* Pet. App. 17c (finding that Amtrak's executives "were themselves at odds over the meaning of Amtrak's policy").

These included a long-running ad for *The Plain Truth*, a free conservative religious magazine dealing with social and political issues that sold nothing and was both advertised and distributed from a four-sided kiosk immediately in front of the Spectacular, the billboard to which Michael Lebron sought access. Because Amtrak had one stationwide policy, the *Plain Truth* ad could have been displayed on the Spectacular. At the time Amtrak rejected Lebron's ad, the *Plain Truth* ad read "Say No to Adultery." Yet Amtrak maintains that it could constitutionally invoke an unwritten policy to reject Lebron's ad—which essentially said "Say No to Coors"—on the ground that his ad was noncommercial, and therefore "political."

The only way to uphold such viewpoint-based discrimination is to disregard Amtrak's prior treatment of advertising under the policy, which is precisely what the panel majority did. As Chief Judge Jon O. Newman pointed out in dissent, "[t]he majority has concluded that the policy has been consistently applied by overlooking the instances where it has not been consistently applied." Pet. App. 5b.

In its opposition, Amtrak seeks to defend the court of appeals' blindered analysis by advancing a "display-case-by-display-case" theory of public forum doctrine. Under this theory, the government may justify discriminatory treatment of speech under a single policy by limiting judicial inquiry to the specific display case to which a speaker sought access, even where under the government's own asserted policy the same content standards apply to all display cases.

If the government can avoid a charge of viewpoint or content discrimination by simply disregarding its prior inconsistent treatment of other speech, it will always be able to argue that its actions were neutral. The court of appeals' analysis robs both the public forum doctrine and the content and viewpoint neutrality mandates of any vitality, and therefore warrants review.

ARGUMENT

I. THE INTERLOCUTORY NATURE OF THE COURT OF APPEALS' DECISION DOES NOT PRECLUDE SUPREME COURT REVIEW

As a threshold matter, Amtrak argues that the Court should not grant certiorari because the court of appeals remanded the case to the district court for resolution of Lebron's contract claim, making its decision technically interlocutory. But there is no jurisdictional bar to review of interlocutory federal court of appeals decisions under 28 U.S.C. § 1254(1), and this Court often grants such review where First Amendment rights are at issue.[2] Where, as here, delaying review will cause harm to time-sensitive First Amendment rights and upholding the constitutional claims will terminate the litigation, immediate review is especially warranted.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Precisely because Lebron's ad was time-sensitive, the district court expedited proceedings and issued a permanent injunction within five weeks after filing. Yet the court of appeals' stay of that injunction has now been in place for more than three years, as this case has proceeded to the court of appeals twice, and is now before this Court for a second time. Remitting Lebron to district court to litigate his contract claim at this

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[2] *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975) (granting certiorari from decision affirming preliminary injunction in First Amendment challenge to ordinance against topless dancing); *Herbert v. Lando*, 441 U.S. 153, 158 & n.3 (1979) (granting certiorari to review order protecting libel defendant from discovery and remanding for further proceedings); *Time, Inc. v. Pape*, 401 U.S. 279, 283 (1971) (granting certiorari from interlocutory order remanding libel case to district court for jury determination); *see generally* 17 Charles A. Wright et al., *Federal Practice and Procedure* § 4036 at 30-31 (2d ed. 1988) (and cases cited therein); Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 4.18 at 195 (7th ed. 1993).

late date would at a minimum delay relief for several more years. Even where speech rights are not at stake, the Court has granted certiorari from a non-final judgment where "delay of perhaps a number of years . . . might work a great injustice." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964).

The Court's concern for the impact of delay on First Amendment freedoms has led it to review even interlocutory state court judgments, where, unlike here, finality is a jurisdictional prerequisite. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for example, the Court granted certiorari to review the constitutionality of a right-of-reply statute, even though the Florida Supreme Court had remanded the case for trial. Had the newspaper prevailed on statutory grounds at trial, the constitutional issue might have been avoided. Nonetheless, the Court granted certiorari, stating, "it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the statute] could only further harm the operation of a free press." *Id.* at 247 n.6.[3] The case for immediate review is even stronger here, where there is no "finality" jurisdictional requirement, and delaying resolution will result not merely in an indirect chilling effect, but in the direct and continuing deprivation of speech rights.[4]

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[3] *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975) (granting certiorari to review First Amendment challenge to a rape victim shield law, where the state supreme court had remanded for further proceedings, because "a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt"); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989) (granting certiorari where party seeking review might prevail on nonconstitutional grounds in further state court proceedings because resolution of First Amendment issue "should not remain in doubt").

[4] *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n. (1971) (granting certiorari to review state court's temporary injunction where "the temporary injunction . . . which has already been in effect

Amtrak also invokes the prudential rule that constitutional questions should be avoided where the dispute may be resolved on nonconstitutional grounds. But that rule does not apply here. First, nonconstitutional grounds not considered below do not trigger this prudential rule:

> The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke th[e] rule [of avoiding constitutional questions]. 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, ___, 113 S.Ct. 2462, 2466 (1993) (*quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).[5] This case has been litigated solely on First Amendment grounds since the district court's initial decision in February 1993, and Amtrak has never previously argued that the contract claim should have been resolved first. Indeed, plaintiff did not pursue his state law claim on appeal, and did not ask that the state law claim be resurrected.[6]

Second, the state law claim to which Amtrak now points would not provide Lebron with complete relief, and therefore

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for over three years, has already had marked impact on petitioner's First Amendment rights").

[5] *See also Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987) (granting certiorari to decide First Amendment issue where district court and court of appeals decided case on First Amendment grounds without reaching plaintiffs' state law claims).

[6] The court of appeals resurrected the state law claim *sua sponte*, not when it issued its initial decision on the First Amendment claims in October 1995 (Pet. App. 18a), but only when it denied rehearing. Pet. App. 30. Lebron should not be forced to forfeit expeditious resolution of his First Amendment claim merely because a panel that may have considered its opinion vulnerable to this Court's review sought to render its opinion interlocutory, by reviving a claim no party had mentioned, much less pursued.

would not permit avoidance of the First Amendment issue.[7] Contract law offers no basis for expedited relief to forestall Lebron's irreparable injury to his First Amendment rights, and therefore cannot provide *immediate* relief for that injury. Moreover, the scope of Amtrak's "disapproval" rights under the contract may turn on whether it had *constitutional* authority to reject the ad as political. Thus, the contract claim will not render First Amendment analysis unnecessary.

Third, the Court has reviewed interlocutory judgments in speech cases even where unresolved nonconstitutional claims could theoretically provide full relief. *See Tornillo*, 418 U.S. at 247; *Cox Broadcasting*, 420 U.S. at 485; *Organization for a Better Austin*, 402 U.S. at 418 n.. Those cases establish that the mere possibility of nonconstitutional resolution is no bar to review where, as here, the lower courts have finally resolved the First Amendment claim, further delay will cause continuing First Amendment harm, and upholding the First Amendment claim will terminate the litigation.

II. EVEN IF THE FORUM IS LIMITED TO THE SPECTACULAR, PUBLIC FORUM ANALYSIS REQUIRES EXAMINATION OF HOW AMTRAK IMPLEMENTED ITS STATIONWIDE POLICY ON OTHER BILLBOARDS

Amtrak's "display-case-by-display-case" theory of the public forum is predicated on the argument that the relevant "forum" is the Spectacular because that is the specific billboard to which Lebron sought access. But even assuming that the forum should be so limited, it does not follow that evidence of Amtrak's acceptance of noncommercial ads on other Penn Station billboards is irrelevant. Since by Amtrak's own account it applies *the same policy* to all advertising spaces in

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[7] Indeed, Amtrak has argued that there is no contract between Lebron and Amtrak, and that the TDI-Amtrak contract language providing that "all advertising material . . . shall be subject to approval by Amtrak," E5, precludes any contract relief.

Penn Station, evidence regarding the policy's implementation throughout the station sheds light on the actual scope of the policy as to the Spectacular. Indeed, where the policy is unwritten, and no two Amtrak officials can agree on its scope, Amtrak's practices may be the best evidence of the policy.

The court of appeals' contrary view is in direct conflict with *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1154 (7th Cir. 1995). In that case, the Seventh Circuit held that public forum analysis must not accept the government's "stated or paper policy," but must "examine the *actual* policy—as gleaned from the *consistent* practice with respect to various speakers—to determine whether a state intended to create a designated public forum" (emphasis added). Such an inquiry is necessary to "guard against the dangers of post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy." *Id.* at 1153; *see also United States* v. *Kokinda*, 497 U.S. 720, 737-38 (Kennedy, J., concurring) ("If our public forum jurisprudence is to retain vitality, we must recognize that . . . customary use by the public may control the case.").

The district court found that under its single stationwide policy, Amtrak had permitted the display of numerous non-commercial ads,[8] including the *Plain Truth* ad.[9] In fact,

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[8] Amtrak now objects that the record does not support this finding, Pet. Opp. 14, but Amtrak did not challenge the district court's finding as clearly erroneous on appeal. It is too late in the day to challenge it now.

[9] Amtrak's assertion that its display of the *Plain Truth* ad was consistent with "the acceptance of advertisements for publications without reference to the publication's content," Pet. Opp. 14 n.6, is contradicted by its own officials' testimony and has never been asserted before. Both Amtrak's Vice-President in charge of advertising and Bruce Bourque, who reviews advertising content for Amtrak, testified that an ad discussing *Time* magazine's coverage of Mikhail Gorbachev's fall would be barred for its "political" content. DeAngelo Dep. at 308, 314; A835-35; E306. Amtrak cites only E261 and E347 as support for its newly claimed policy on publications, neither of which even addresses

Amtrak had *never* previously rejected an ad as political. This evidence establishes that Amtrak's invocation of its unwritten policy against Lebron was either "post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy." *Air Line Pilots Ass'n*, 45 F.3d at 1153. Yet the panel considered none of that evidence relevant.

In this respect, the panel's result directly conflicts with *Air Line Pilots Ass'n*. In that case, although the union sought access to a single display case in O'Hare Airport's Concourse B, 44 F.3d at 1148, the Seventh Circuit did not limit its inquiry to one specific display case. Indeed, the court specifically reversed the district court because it had examined only the 48 display cases in Concourse B, rather than all O'Hare advertising spaces. *Id.* at 1154. Here, the panel majority limited its inquiry to a single display case, and in doing so undermined any speech-protective function of the public forum doctrine.

III. THE COURT OF APPEALS' DETERMINATION THAT AMTRAK'S POLICY WAS VIEWPOINT-NEUTRAL CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

Lebron argued that Amtrak's conduct in this case was viewpoint discriminatory in two senses: (1) it permitted the display of the politically conservative, noncommercial *Plain Truth* ad

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the issue. E261 lists advertisers who displayed ads in Penn Station, and E347 is petitioner's objection to the quality of certain photocopies. And even this post-hoc justification fails to explain how an ad for a purely noncommercial magazine falls within a policy purportedly limited to commercial ads.

If Amtrak's policy were to accept any ad for a publication, no matter how political the ad, and regardless of the noncommercial nature of the publication, its policy would be unreasonable in light of the purposes of the forum because it would not serve Amtrak's asserted purpose of avoiding political controversy. Amtrak's claim that Lebron has not challenged Amtrak's policy as "unreasonable" in light of the purposes of the forum, Pet. Opp. 20, is simply wrong. *See* Pet. 21 n.20.

while barring the display of Lebron's politically liberal noncommercial ad; and (2) its policy against "political" advertisements is itself viewpoint-based under this Court's decisions holding policies against "religious" speech viewpoint-based. Pet. 14-16.

Amtrak offers no response whatsoever to the first argument, except to proffer for the first time a purported policy regarding advertising for publications that is contrary to its own officials' testimony and that renders the policy wholly arbitrary. The undisputed fact is that Amtrak displayed politically conservative noncommercial ads for *The Plain Truth* for five years, and then turned around and told Lebron it would not display his ad because it was political. A more blatant form of viewpoint discrimination would be difficult to imagine.

Amtrak maintains that its general policy is viewpoint-neutral because it prohibits political "subject matter," not political viewpoints. But whatever else one might say about Lebron's ad, it plainly addresses the otherwise includable subject of whether to buy Coors beer. *See* Pet. Opp. 1a. Amtrak does not deny that under its policy Coors could display ads urging viewers to buy Coors beer, and Anheuser-Busch could display ads urging viewers not to buy Coors beer because Budweiser tastes better. Thus, the same subject matter—whether to buy Coors beer—is permitted if addressed from a "commercial" viewpoint, but barred if addressed from a "political" viewpoint. Under *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Air Line Pilots Ass'n*, 45 F.3d at 1159, that is viewpoint discrimination.

IV. AMTRAK'S POLICY CANNOT BE SQUARED WITH *HYNES V. MAYOR OF ORADELL*

Amtrak contends that the panel majority's rejection of Lebron's vagueness challenge is consistent with this Court's

decision in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), because the Court in *Oradell* objected to the failure to define "cause," not "political." This reading is disingenuous.

The ordinance *Hynes* invalidated required permits for solicitations "for a Federal, State, County or Municipal political campaign or cause." 425 U.S. at 614 n.1. Describing the vagueness challenge, the Court stated that "persons canvassing for political causes would be uncertain whether the ordinance covered them." *Id.* at 621 n.5. And in declaring the ordinance vague, the Court expressly stated, "nor is political 'cause' defined." *Id.* at 622. The constitutional infirmity was that "cause" was modified *only* by "political," and therefore the prohibited causes were insufficiently clear. Similarly here, "advertisement" is modified only by "political," leaving would-be advertisers to guess as to what is permitted and what is not.[10]

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

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[10] Finally, Amtrak suggests that the plurality decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), implicitly holds that a policy against political advertising is not vague, notwithstanding the plurality's failure to address the issue, because the dissent complained of the inability to distinguish ideological and nonideological speech. Pet. Opp. 23-24. But petitioners in Lehman advanced no vagueness challenge, and therefore that issue was not before the Court. In addition, the plurality expressly relied on the fact that the Ohio Supreme Court had narrowly construed the ordinance so that it distinguished sharply between advertisers seeking to sell a good or service, and all others. 418 U.S. at 303-04. As the district court found, Pet. App. 16c-19c, and as Amtrak's opposition confirms, Amtrak's unwritten policy has no sharp lines, and that is precisely the problem.

Respectfully submitted,

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